United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

Original - Affidavit of Mailing

74-1229

To be argued by
ROBERT ROSENTHAL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1229

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

—against—

ARTICLES OF JEWELRY and WEARING APPAREL and HARRIET SENZ,
Defendant-Appellee Cross-Appellant,

IRA SENZ,
Claimant-Intervenor Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE PLAINTIFF-APPELLANT

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ROBERT ROSENTHAL,
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Of Counsel.

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Preliminary Statement

The United States of America appeals from a judgment of the United States District Court for the Eastern District of New York (Mishler, *Ch. J.*) entered on September 21, 1973, after a trial before the District Court, which judgment denied in substantial part the Government's claim pursuant to Title 19, United States Code, Section 1497 for forfeiture of eight articles of jewelry and one item of clothing as well as the accompanying claim for penalties against Mrs. Harriet L. Senz.

On March 6, 1970, the Government commenced an action in the United States District Court for the Eastern District

of New York seeking forfeiture of eight articles of jewelry and three items of wearing apparel belonging to Mrs. Harriet L. Senz. The complaint also sought the imposition of penalties against Mrs. Senz for her failure to declare the jewelry and clothing upon her return to the United States on September 11, 1968. At the time of Mrs. Senz' re-entry, these articles of jewelry and wearing apparel were seized by United States Customs when an inspection revealed that they each bore foreign markings.

Following the commencement of the action, Mr. Ira Senz intervened claiming ownership of the seized articles by notice of claim and answer dated April 24, 1970 (A. 12-18). Thereafter, shortly before trial, Mrs. Senz filed an amended answer, counterclaiming against the United States for damages alleging a wrongful detention of her property and cross-claiming against her husband, Ira Senz, seeking indemnification in the event she were required to pay penalties.

The case was tried before Chief Judge Mishler on the afternoons of April 6 and April 9, 1973. Customs Inspector John Turano and import specialist Anthony Lubrano testified for the Government and Mrs. Senz testified in her own behalf. No other witnesses were called.

In a Memorandum of Decision dated August 10, 1973, Chief Judge Mishler denied the Government's claim for forfeiture of all seized articles with the exception of item 10 which Judge Mishler found was first brought into the United States on September 11, 1968. At the same time, Chief Judge Mishler dismissed the claim of Ira Senz, finding that the claimant had failed to establish any right to any of the seized items. The District Court likewise dismissed as moot the cross-claim of Harriet Senz against her husband. Judgment was entered on September 21, 1973, and the Government filed a timely Notice of Appeal on November 16, 1973. On November 28, 1973, defendant-appellee filed a Notice of Cross-Appeal against the claimant-intervenor Ira Senz.

Questions Presented

1. Whether the District Court erred in concluding that items one through eight were non-dutiable absent any proof at trial that duty on those items had ever been paid.

2. Whether the District Court erred in holding that the failure to declare non-dutiable goods is not penalized by Title 19, United States Code, Section 1497.

Statement of Facts

On September 11, 1968, Mrs. Harriet L. Senz debarked from TWA Flight 711 (from London, England) at John F. Kennedy International Airport in Queens, New York (A. 25-26). Mrs. Senz passed first through a primary customs inspection area at which point she was instructed to proceed to a secondary inspection station manned by Customs Inspector John Turano. Mrs. Senz delivered to Inspector Turano her customs declaration form (A. 24). The inspector noticed that she had declared nothing on the form, and he then asked her "if she had purchased any items abroad during her recent trip, including any item which she thought did not have to be declared." Mrs. Senz then advised Inspector Turano that she had purchased several items during her trip, and she then amended her declaration to include these items. (Because of her declaration of these items, the Government did not seek forfeiture and they are not involved in this action.)

At the secondary inspection station, Mr. Turano then proceeded with an examination of Mrs. Senz' baggage. After examining one piece of luggage, he asked her if he could see "her articles of jewelry if she had any." Mrs. Senz presented him with her jewelry bag which Inspector Turano examined and found to contain several items which featured foreign markings. Mr. Turano then summoned his supervisor, and the two men then escorted Mrs. Senz to a private

search room. During this investigation, Mrs. Senz explained to Mr. Turano that she did not know whether or not the items of jewelry had ever been declared because her husband had always handled the customs declarations upon her return from trips abroad.* At the conclusion of this investigation, the customs officers seized eight items of jewelry and two items of clothing. A third item of clothing which Mrs. Senz was wearing at the time was "seized" but was not reduced to possession.

ARGUMENT

The United States is prosecuting this appeal because the decision of the District Court, if allowed to stand, will result in a substantial adverse impact on the ability of the Customs Service to enforce the Tariff laws. In holding that the declaration provisions of the Tariff Act apply only to dutiable goods, the court has in effect made each traveler, rather than Customs officials, the judge of whether items are subject to duty. As shown in Part I below, the District Court's construction of the statute is contrary to the plain language, legislative history, and purposes of the Tariff Act of 1930. The District Court's holding also fails to give due deference to established administrative construction of the act and is inconsistent with correlative statutory provisions.

In Part II below, we show that even if the District Court's construction of the act were correct, the goods in question were not duty-free. Finally, in Part III, the question of notice is discussed.

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* Mr. Senz, the claimant-intervenor against his wife, did not testify at trial.

I.

The District Court erred in holding that the duty to declare extended only to dutiable goods.

19 U.S.C. 1497 provides for forfeiture of items imported into the country which are not declared before examination of the baggage if written or oral declaration was required. 19 U.S.C. 1498 authorizes the Secretary of the Treasury to promulgate regulations governing declarations and entry of certain categories of goods. 19 U.S.C. 1498(a)(4) specifically refers to "personal effects" and subsection (a)(6) refers to "[a]rticles carried on the person or contained in the baggage of a person arriving in the United States." Pursuant to these provisions and authority delegated by the Secretary of the Treasury, the Commissioner of Customs promulgated 19 C.F.R. 10.19 (in effect at the time of Mrs. Senz' arrival) which required that "All articles brought into the United States by an individual shall be declared to a Customs officer."

Despite the plain language of the foregoing statutes and regulation, the District Court held that the forfeiture provisions of 19 U.S.C. 1497 applied only to dutiable goods. The District Court erroneously relied on a House Report relating to a bill which was ultimately not enacted. H.R. Report No. 248, 67th Cong., 1st Sess. 25 (1921). The history of the forfeiture and declaration provisions demonstrates that Congress intended duty-free goods to be subject to declaration and forfeiture for failure to declare.

Prior to 1922 the Tariff Act required declaration of all goods sought to be imported (Rev. Stat. § 2799). Customs inspectors were authorized to examine baggage for the purpose of determining the presence of dutiable articles (Rev. Stat. § 2800) and forfeiture applied only to undeclared dutiable goods (Rev. Stat. § 2801).

In 1921 the 67th Congress began a revision of the Tariff laws and a House bill was drafted which would have retained the dutiable goods language in the examination provision. Subsequently, the Senate amended the House bill examination provision to include the words "whether subject to duty, free of duty, or prohibited." *

The Senate versions were subsequently adopted by the House and appeared as sections 496, 497 of the Tariff Act of 1922. In accepting the Senate version, the House report stated:

> The House bill failed to authorize the collector to examine the baggage in order to ascertain whether it contained articles free of duty or prohibited. The Senate amendment vests him this authority, and the House recedes." H.R. Report No. 1223, 67th Cong., 2nd Sess. 155, Amendment 1963 (1922) (Conference Report on Tariff Act of 1922).

The provisions of the 1922 Act were subsequently reenacted in the Tariff Act of 1930, which, with certain changes not relevant to this case, were in force at the time of Mrs. Senz' arrival.

It is therefore clear that Congress intended all articles to be subject to declaration without regard to their duty-status and that failure to declare should result in for-

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* H.R. 7456 as passed by House of Representatives:

Sec. 504. Same—Examination.—The collector of customs may cause an examination to be made of the baggage of any person arriving in the United States in order to ascertain what articles contained therein are subject to duty, notwithstanding a declaration and entry therefor shall have been made.

H.R. 7456 as amended and passed by Senate and as enacted into law:

Sec. 496. Examination of Baggage.—The collector may cause an examination to be made of the baggage of any per-

feiture.* The Tariff Act has been so construed by the Customs Service as reflected in its regulations. The administrative construction is entitled to great deference. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1964), and "should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

The District Court's decision also disregards the enforcement structure established by the Tariff Act. As noted earlier, 19 U.S.C. 1498 authorizes regulations governing declaration of certain categories of articles, some of which are duty-free. However, the classification of duty status may not be capable of determination prior to declaration. For example, the classification may depend on facts other than a simple examination of the articles in question. See 19 U.S.C. 1202, general headnote 11. Declaration of all articles is therefore necessary to proper classification of articles and effective enforcement of the tariff laws.

In sum, it is clear that Mrs. Senz failed to declare the jewelry upon entry, and it is equally clear that the jewelry was properly subject to forfeiture under 19 U.S.C. 1497. As the Supreme Court stated in *One Lot Emerald Cut Stones and One Ring* v. *United States*, 409 U.S. 232, 234 (1972):

> "To succeed in a forfeiture action under section 1497, * * * the Government need only prove that the property was brought into the United States without the required declaration * * * "

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son arriving in the United States in order to ascertain what articles are contained therein, and whether subject to duty, free of duty, or prohibited notwithstanding a declaration and entry therefore has been made.

* There can be no suggestion that the 1922 Act was not intended to make substantive changes in the Tariff laws. The House bill had contained a provision stating that the bill was merely a codification of previous law. The Senate deleted this provision because the "normal rules of construction should apply." H.R. Report No. 1223, *supra* at p. 157.

II.

The District Court erred in holding that the articles imported were "personal effects" and therefore duty free.

Assuming for purposes of discussion that the forfeiture provisions apply only to dutiable goods, the jewelry * imported by Mrs. Senz was properly forfeited. Although the court found, relying on Mrs. Senz' testimony, that the jewelry while of foreign origin had been previously imported, there was no finding that the prior importations had been in accordance with the law. Indeed, Mrs. Senz testified that she did not know whether the jewelry had even been declared or duty paid. Although generally classifiable as "personal effects," such items cannot be legally so classified absent proof of prior legal entry; otherwise, articles would upon being illegally entered forever escape collection of duties.

Despite the apparently controlling application of 19 C.F.R. § 10.17(a), Judge Mishler's conclusion was erroneous because defendant-appellee failed to introduce any evidence at trial to show that duty had ever been paid on items one through eight.** Section 10.17(a) must be construed to

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* The Court found that two items of clothing seized by Customs officials were not of foreign origin. That finding is not involved in this appeal.

** Title 19, United States Code, Section 1615 places the burden of proof in a forfeiture proceeding upon the person claiming ownership of the property being sought. Compare *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 93 S. Ct. 489, 491-92 (1973), where the Supreme Court, in a *per curiam* opinion, expressed the Government's limited burden in a forfeiture proceeding as follows: "To succeed in a forfeiture action under § 1497 [19 U.S.C. § 1497], on the other hand, the Government need only prove that the property was brought into the United States without the required declaration."

grant duty-free status only to those personal effects having a foreign origin which are taken abroad and *for which duty had at one time been paid.* Judge Mishler's literal interpretation of section 10.17(a) which allowed duty-free status to these personal effects regardless of whether or not duty had ever been paid, transforms the regulation into a self-imposed waiver provision obviously unintended by the Bureau of Customs. Simply stated, Judge Mishler's construction of the regulation would mean that whenever personal effects are introduced into this country by anyone who successfully avoids the duty owing, Customs would in effect be forever estopped from collecting that duty. Such a construction is clearly erroneous. In fact, Judge Mishler and counsel for defendant-appellee agreed during trial that the Government "never waives it's [sic] right to collect lawful duty . . ." (T. 30-31).* There having been no evidence presented by defendant-appellee that duty on the seized articles had ever been paid,** Judge Mishler's conclusion that the articles were duty-free upon their return to the United States was error.

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* Page references preceded by the letter "T" refer to the trial transcript.

** The testimony of Customs Inspector John Turano dealt generally with the subject of prior declarations. Turano recalled that during the examination, Mrs. Senz advised him that item seven (a diamond broach—export value $2500) was never even declared (T. 55). Mrs. Senz explained to Turano that she did not know whether the other items had been declared because her husband would always handle the declarations (T. 56). Mrs. Senz herself testified that on such occasions her husband would order her to "shut up and stand aside" (A. 95-96). (*See* Report of Seizure—Gov't Exhibit 3.)

III.

The notice issue.

The opinion of the District Court indicates the court's concern that Mrs. Senz may have been misled by the declaration form which required declaration of all articles "acquired abroad" and by the customs agent who asked if she had anything to declare, including anything purchased on her recent trip.*

While the declaration form and the agent's statement would be troublesome in certain circumstances, here Mrs. Senz knew or should have known that the articles of jewelry had never been legally imported. Even if Mrs. Senz was uncertain as to whether the jewelry had ever been declared, she should have declared it upon entry.

CONCLUSION

The judgment of the District Court should be reversed and the case should be remanded to the District Court with instructions to enter judgment of forfeiture on behalf of the United States for items one through eight and to impose a penalty equal to the value of such articles.

Respectfully submitted,

April 5, 1974

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Of Counsel.

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* It should be noted that forfeiture does not rest on a showing of intent (*United States* v. *One Lot Emerald-Cut Stones, supra*), and that this Court has held that forfeiture is applicable even where the traveler has been misled. *United States* v. *One Pearl Necklace,* 111 F. 164, 171 (2d Cir. 1901).

2a-6a

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 5th day of April 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, two copies of Brief for the Appellant and Joint Appendix of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Phillips, Nizer, Benjamin,
Krim & Ballon, Esqs.
477 Madison Avenue
New York, New York 10022

Austrian, Lance & Stewart, Esqs.
280 Park Avenue
New York, New York [redacted]2

Sworn to before me this
5th day of April 1974

IRENE B. COHEN
Notary Public, State of New York
No. 24-0683765
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1976

Deborah J. Amundsen
DEBORAH J. AMUNDSEN

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____duly entered herein on the ____ day of _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,
Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

_____ Action No._____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____
United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____
_____is hereby admitted.
Dated: _____, 19____

_____
Attorney for _____

FPI-LC-5M-8-73-7355